(1)

91-524

NO.

IN THE SUPREME COURT OF

THE UNITED STATES

1991 TERM

Toni Wilson . . . . . .Appellant

v.

Ledger D. Kauffman . . . .Appellee

Appeal from the Indiana Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION-PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution is violated when the sole black juror at a black litigant's trial is removed by opposing counsel by peremptory challenge after the trial court had required opposing counsel to come forward with a racially neutral explanation for the challenge and the Indiana Court of Appeals has held that the burden is on the minority litigant to prove that the challenge was based on race.

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TABLE OF AUTHORITIES

OFFICIAL REPORTS OF OPINIONS BY OTHER COURTS

The opinion of the Indiana Court of Appeals, from which Toni Wilson appeals appears in the Appendix hereto, pp. 18-45, infra, and is reported at Ind. App., 563 N.E.2d 610.

JURISDICTION

The judgment of the Indiana Court of Appeals which placed the burden on Wilson to establish racial discrimination in jury selection after the trial court had ruled that opposing counsel was required to state a racially-neutral reason for the

peremptory challenge of the sole black juror on Wilson's panel was entered on November 26, 1990. Appellant filed a Petition for Rehearing on December 13, 1990, before the Indiana Court of Appeals which was denied on January 18, 1991. Appellant filed a Petition for Transfer to the Indiana Supreme Court on February 7, 1991, which was denied on June 27, 1991.

Appellant timely filed a Notice of Appeal to the United States Supreme Court with the Clerk of the Indiana Supreme Court and Court of Appeals on September 24, 1991.

This appeal is being docketed in this court within ninety (90) days from the denial of Transfer by the Indiana Supreme Court. The jurisdiction of this court is

invoked under 28 U.S.C. Sec. 1257(a).

UNITED STATES

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment: (Due Process and Equal Protection) Sec. 1:

> . . . .No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Toni Wilson was injured in an automobile collision on October 13, 1983, and brought a personal injury action against Ledger D. Kauffman for damages in the

Elkhart Superior Court, Division III. On February 1, 1989, the trial court empaneled a jury which contained one female black juror by the name of Charlie Pulluaim. Toni Wilson is also black. Subsequent to the interrogation of juror Pulluaim by Wilson's counsel, the trial court called counsel to the bench and instructed them by giving them a card which stated that any challenge of juror Pulluaim would have to be for a racially-neutral reason. Juror Pulluaim was then questioned by Kauffman's counsel and answered each of the questions correctly. Juror Pulluaim had stated that she had heard of Toni Wilson but was not personally acquainted with her. Following the interrogation of juror Pulluaim by Kauf-

fman's counsel, Kauffman's counsel then challenged juror Pulluaim peremptorily and Wilson's counsel objected. The court then called a recess and instructed counsel to submit their positions in writing. Wilson's counsel stated that the sole reason for the challenge was that the juror was black and Toni Wilson was black and that there was no evidence the juror was not fully qualified and that Kauffman had failed to establish a racially neutral reason for removing juror Pulluaim. Kauffman's counsel cited his reasons for the challenge that juror Pulluaim did not appear to understand his questions, that she knew of Toni Wilson and that the white juror next in line was the wife of a physician and medical evidence was an issue

in the case. The trial court told counsel at the bench that juror Pulluaim did not appear to understand the questions of Kauffman's counsel, although the transcript shows she answered each question correctly. The trial court sustained the challenge.

FEDERAL DUE PROCESS RAISED

The Appellant raised the United States Constitutional questions presented by this appeal before the trial court by contending that Kauffman did not meet his burden of proof to establish racial neutrality.

On appeal to the Indiana Court of Appeals, Wilson asserted that the trial

court had correctly applied the Batson Rule[1] to a civil trial[2] and argued that the burden of proof to establish racial neutrality of a peremptory challenge was upon Kauffman. Wilson argued that the trial court's adoption of this procedure was consistent with the Batson rule and that Kauffman had failed to meet his burden.

The Indiana Court of Appeals adopted Wilson's argument that the trial court correctly applied the Batson Rule to a civil case, holding that there is signif-

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[1] Batson v. Kentucky (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 69.

[2] Edmonson v. Leesville Concrete Company (1991) 111 S.Ct. 41.

cant state action on the part of the trial judge who is a state actor in acting to sustain a statutorily granted peremptory challenge. The Indiana Court of Appeals, however, erroneously rejected Wilson's appeal by holding that the burden was on Wilson to show facts that give rise to an inference that the challenge was based on race and that Wilson had failed to meet this burden of proof. There was no discussion in the opinion as to any burden on Kauffman to establish that his challenge was racially-neutral, which was the standard placed on both counsel by the trial court in regulating the voir dire examination.

THE ISSUE PRESENTED IS SUBSTANTIAL

Fundamental to a free citizenry is the right to trial by jury before jurors drawn from a cross-section of the community. Historically, peremptory challenges could be made for any reason but Indiana Law has held that there is no right to a peremptory challenge. Previous case law which allowed peremptory challenges to exclude blacks from juries has been overturned and replaced with the doctrine that jury selection must be conducted on a race-neutral basis. This court has left it to trial courts to implement the Batson rule in the jury selection process[3] and the trial court in this case implemented it by requiring the challenge to be for a

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[3] Ford v. Georgia (1991) 111 S.Ct. 850.

racially neutral reason. The adoption of this practice by the trial court effectively relieved Wilson of any further burden of establishing a prima facie showing of discrimination and shifted the burden to Kauffman to come forward with a racially neutral reason. The Indiana Court of Appeals has chosen to place the burden back on Wilson to prove discrimination instead of requiring Kauffman to demonstrate facts within his knowledge as to why the only black juror should be removed. The selection of an impartial jury would indeed be a vain and illusory ideal if the minority litigant is required to meet a burden of proof beyond a prima facie showing as the Indiana Court of Appeals is now requiring. Kauffman's

challenges were not race neutral. His contention that juror Pulluaim did not understand the questions is not supported by the record, which showed no lack of understanding. The only thing that distinguished juror Pulluaim from the way the other jurors answered questions was that she was black and spoke with a minority accent. Kauffman's second contention that the juror "knew of" Toni Wilson is not free of race-bias. The juror stated she did not personally know Wilson. If it is a sufficient basis for a challenge to argue that a juror knows of a litigant, it is difficult to see how a black litigant could ever have a jury with members of her own race on the panel. In a small community where the members of a black minority

live in the same area of town it is expected that members of the minority would "know of" each other. Using this as a basis for a challenge is the same as saying that belonging to the minority community is a basis for a peremptory challenge. This type of challenge would necessarily exclude large members of minority persons from jury service and would deprive the litigant of the constitutional right to jury selection on other than race-identity qualifications. The third basis of Kauffman's challenge was the most outrageous, that the white wife of a physician was more qualified than the black juror to judge a personal injury case. Even the Indiana Court of Appeals agreed that this challenge alone would not have

survived the Batson test.[4] Counsel for Kauffman did not ask the black juror anything about her knowledge of medicine so as to compare her to the physician's wife. Finally, Kauffman did not attempt to challenge the juror at all on the most obvious basis for a challenge, namely, that the juror had previously had a personal injury claim herself. Instead, all three reasons given for the challenge related to race based criteria: 1) Speech patterns in answering questions; 2) Living in a minority community so as to know of another black resident of the community, and 3) The alleged superior ability of the physician's white wife to judge a personal

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[4] Wilson v. Kauffman (1990) 563 N.E.2d 610, 614.

injury case, who was of a presumably superior racial and social class than the black juror.

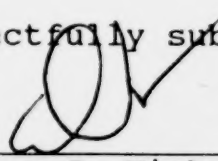
To place the burden on the black litigant to explain the illogic of such a challenge is not where the burden belongs. The trial judge was satisfied that enough of a prima facie showing existed to require counsel to come forward with a racially neutral reason for challenge of the only black juror. The right to an impartial jury of one's peers is so important that the burden belongs on the party challenging the minority juror to explain his challenge by clear and convincing evidence. The minority litigant cannot look into opposing counsel's mind to fathom all devious motives. Considering that com-

ments on jury challenges must be made with little time for reflection or investigation into the background of a juror, it is appropriate that the party desiring to create an all-white jury for a black litigant should have a good reason for doing so, if not a challenge for cause, at least the burden of coming forward with a good and sufficient reason. The system of peremptory challenges is not an absolute right as the trend in the law is to require some rationality in the process so as to eliminate the opportunity to challenge for a racially discriminatory reason. Such an opportunity continues where the burden is on the minority party rather than the challenging party to justify the reason for the challenge. The Indiana

Court of Appeals opinion encourages continued challenges of black jurors by white litigants in placing the burden on the minority litigant to "prove" the challenge is not race-neutral. This opinion is a step back in time and ignores the intent of the Batson rule that the burden shift to the challenging party to come forward with a race-neutral explanation, which is lacking in this case.

For those foregoing reasons, this court should note probable jurisdiction of this appeal and grant certiorari.

Respectfully submitted,



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APPENDIX

IN THE

COURT OF APPEALS OF INDIANA

TONI WILSON APPELLANT, v. LEDGER D. KAUFFMAN, APPELLEE.	)))NO. 20A04-8909-CV-398)))

COURT OF APPEALS OF INDIANA,
FOURTH DISTRICT.
NOVEMBER 26, 1990.
REHEARING DENIED JAN. 18, 1991

Motorist brought personal injury action against truck driver. The Elkhart Superior Court, Worth N. Yoder, J., rendered judgment for motorist and she appealed. The Court of Appeals, Miller, P.J., held that: (1) although Batson applied to civil cases, plaintiff failed to show that defendant's exclusion of only black venireperson was due to racial discrimination; (2) any error occurring in admission of medical report was harmless; and (3) jury award was not inadequate.

Affirmed.

Charles C. Wicks, Elkhart, for appellant.
John D. Ulmer, Bryant C. Haney, Yoder, Ainlay, Ulmer & Buckingham, Goshen, for appellee.

MILLER, Presiding Judge.

Toni Wilson, Plaintiff-appellant, a black female, obtained a jury award of $10,000 for injuries she sustained when a car driven by Ricky Chapman was pushed into her car by Ledger Kauffman, Defendant-appellee. Wilson appeals the jury award in her favor, raising the following issues:

I. Whether the court erred in granting defendant's peremptory challenge to juror Pulluaim, who is black.

II. Whether the court erred in denying Wilson's request for a limiting instruction, instructing the jury that the medical report of Dr. Gupta, who did not

testify at trial, was admissible only because it was used by Dr. Papadopoulos, whose videotaped deposition was shown at trial, in arriving at his opinion of Wilson's injuries are not for the truth of the matters asserted in the report.

III. Whether the jury verdict of $10,000 was inadequate.

We affirm.

FACTS

The facts most favorable to the judgment are as follows:

On October 13, 1983, Toni Wilson (Wilson) was traveling north on Benham Avenue in Elkhart, Indiana, when she stopped behind a car that was stalled on the roadway. A car driven by Ricky Chapman stopped behind Wilson's car. Ledger Kauffman was also travelling north on Benham when he saw the Chapman vehicle stopped ahead of him. Kauffman was unable to stop his truck in time to avoid hitting

Chapman's car. As a result of the impact between the Kauffman and Chapman vehicles, Chapman's care was forced into the back of Wilson's Car.

On October 1, 1989, the court impaneled a jury which contained one black juror, Charlie Pulluaim. While Kauffman was questioning Pulluaim, the trial judge instructed Kauffman that if Pulluaim was excused, it would have to be for a racially neutral reason. After Kauffman decided to strike Pulluaim, the court asked Kauffman to submit his reasons for excusing Pulluaim in writing. Wilson was also permitted to submit her objection in writing, but the court found Chapman's reason (sic) for excusing juror Pulluaim to be racially neutral.

During trial, the videotaped deposition of Dr. Papadopoulos, one of Wilson's physician, was shown to the jury. During his deposition, Dr. Papadopoulos stated

that he considered a report prepared by Dr. Gupta, another of Wilson's physicians, in forming his opinion about Wilson's injuries. The report was offered into evidence by Kauffman and admitted over Wilson's objections. Wilson then requested an instruction to the jury that Dr. Gupta's report was offered not for the truth of the matters asserted in the report, but because it was used by Dr. Papadopoulos in arriving at his opinion. Her request was denied.

After the trial, the jury returned a verdict in favor of Wilson and granted her damages in the amount of $10,000.

DECISION

The first issue raised by Wilson is whether the court erred in granting Kauffman's peremptory challenge of juror Pulluaim, the only black person on the venire. Wilson contends that she was denied equal protection of the laws when the

court permitted Kauffman to peremptorily strike Pulluaim. She cites Batson v. Kentucky (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, to support her argument that, once she made a prima facie case of purposeful discrimination, the burden was on Kauffman to prove he was seeking to remove Pulluaim for a racially neutral reason, which he failed to do. Although Wilson recognizes that Batson is a criminal case, she argues it is nonetheless applicable to jury selection in civil cases.

Kauffman, on the other hand, argues that the holding in Batson is limited to jury selection in criminal cases. He asserts that in civil cases, only private actors are involved. Therefore, there is no state action, which is required before a constitutional violation may be found. Alternatively, he argues that Wilson failed to meet her burden of proving pur-

poseful discrimination as required by Batson. He also argues that Pulluaim was dismissed for a racially neutral reason.

[1,2] Private use of state-sanctioned private remedies does not rise to the level of state action. Tulsa Professional Collection Services v. Pope (1988), 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565. however, when private parties make use of state procedures with the overt, significate assistance of state officials, state action may be found. Id. In order for these to be state action, it must be determined that 1) the claimed deprivation has resulted from the exercise of a right or privilege having its source in governmental authority; and 2) there is some figure present in the action who can be fairly characterized as a state actor. Lugar v. Edmondson Oil Co. (1982), 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482.

[3] It is clear that the first require-

ment has been met. The claimed deprivation has resulted from a litigant's use of a statutorily[1] granted peremptory challenge. Id. However, the question of whether there is some figure who can be characterized as a state actor is more difficult to answer.

In a criminal case, the state actor is the prosecutor who exercises the peremptory challenge. Batson, supra. In civil cases, a private litigant exercises the challenge. The only other possible state actor, therefore, is the court. However, in Edmonson v. Leesville Concrete Co., Inc. (1990), 5th Cir., 895 F.2d 218, cert. granted (1990),----U.S.----, 111 S.Ct. 41, 112 L.Ed.2d 18, the court held that when the court allows a juror to be removed peremptorily, it is exercising a ministerial function of permitting venire

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[1] See Ind. Code 34-1-20.5-3.

member cut by counsel to depart. According to the Edmonson court, this purely ministerial action is too insignificant to be considered state action.

In Fludd v. Dykes (1989), 11th Cir., 863 F.2d 822, reh'g denied, (1989), 873 F.2d 300, cert. denied, (1989), ---U.S.---, 110 S.Ct. 201, 107 L.Ed.2d 154, the court reached the opposite result. That court held that when blacks are excluded from jury service because of their race, it is the court and not the attorney who is the actor. Id. The court reasoned:

"Thus until the trial judge overrules a party's objection to the racial composition of the venire, the law treats any previous decision on the part of a state entity to discriminate as harmless, insofar as the objecting party is concerned. The trial judge's decision--to proceed to trial, over the party's objection, with a jury selected from the venire on the basis

of race--is the one that harms the objecting party. In overruling the objection, which informed the court that the peremptory challenger may be excluding blacks from the venire on account of their race, the judge becomes guilty of the sort of discriminatory conduct that the equal protection clause proscribes. Because the trial judge constitutes the discriminatory state actor under the equal protection clause, we conclude that there is no constitutional bar to the application of Batson to a civil suit."

Id. at 828. The trial court judge is the state actor because it is the trial court judge who must decide whether to excuse a juror over an objection by a party that the juror is being excused because of race. Therefore, there is significant action on the part of the judge--a state actor--to sustain a constitutional challenge.

The conclusion reached in Fludd is consistent with the Supreme Court's holding in Tulsa Professional Collection Services, supra, where the court was faced with a constitutional challenge to a nonclaim provision of Oklahoma's probate code which barred creditors' claims against an estate unless they are presented to the executor within two months of the publication of notice of the commencement of probate proceedings. Pope, the executrix of the estate, argued that there was no state action because the nonclaim statue was merely a self-executing statute of limitations. The court, however, found significant state action because of the involvement of the probate court: the probate court is intimately involved in the administration of the estate; the nonclaim statute becomes operative only after probate proceeding has been initiated; and the court appoints the executrix

of the estate. Id.

Likewise, there is significant state involvement here. The court summons the venire, the right to the peremptory challenge is granted by statute and the statute is only significant once the legal proceedings have begun. More importantly, it is the judge who, when faced with a situation such as the one here, must decide whether there exists a racially neutral reason for excusing the juror.

Our Indiana constitution guarantees the right to trial by jury in civil cases. Art. 1 Sec. 20. The selection of persons to be drawn as prospective jurors is the duty of the jury commissioners, who must select those persons "without favor or prejudice". I.C. 33-4-5-1. The selection process itself is governed by statute and is designated to be fair and impartial. See e.g. I.C. 33-4-5-2; I.C. 33-4-5-9. If a litigant were permitted to exercise

peremptory challenges to strike jurors because of their race, these provisions would be rendered a nullity.

In summary, we agree with the Fludd court that there is state action involved in the jury selection process in a civil case and hold, consistent with other jurisdictions,[2] that Batson is applicable to jury selection in civil cases.

(4) Under Batson, the litigant challenging the use of a peremptory challenge must establish a prima facie case of purposeful racial discrimination in the selection of the jury by showing that: 1) she is a member of a cognizable racial group; 2) the prosecution has used a peremptory challenge to remove from the

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[2] Clark v. City of Bridgeport (1986), 645 F.Supp. 890; Thomas v. Diversified Contractors (1989), Ala., 551 So.2d 343; Williams v. Coppola (1986), 41 Conn.Sup. 48, 549 A.2d 1092. Cf. Esposito v. Buonome (1986), 642 F.Supp. 760; Chavous v. Brown (1990), S.C., 396 S.E.2d 98.

venire members of the litigant's race; and 3) the facts and circumstances of the case raise an inference the exclusion was based on race. Batson, supra; Phillips v. State (1986), Ind., 496 N.E.2d 87. Once the defendant has made this showing, the burden shifts to the other litigant to come forward with a neutral explanation for challenging the juror. The court must then determine whether the defendant has established purposeful discrimination. Phillips, supra.

It is not disputed that the first two criteria are met here-Wilson is black and Kauffman exercised a peremptory challenge to remove the only black person impaneled. Wilson has not shown, however, that the facts and circumstances of her case raise an inference the exclusion was based on race.

During voir dire of juror Pulluiam, the trial judge gave Kauffman's counsel a

note telling him that he must give a racially neutral reason if he intend to strike Pulluaim. He permitted both Kauffman and Wilson an opportunity to present their views in writing. In her objection, Wilson did not point to any facts in the case, other than the fact that Wilson and Pulluaim were both black, to raise an inference that the discrimination was purposeful:

"Plaintiff objects to the exclusion of juror Charlie Pulluaim since it appears the real basis for the challenge is that the juror is black and the plaintiff is black. There is no evidence that the juror is not fully qualified and counsel for defendant has failed to establish a racially neutral reason for removing juror Pulluaim."

(R. 493).

(5) The fact that the only black juror has been excused through the use of

peremptory challenge does not raise an inference of racial discrimination. Thorne v. State (1988), Ind., 519 N.E.2d 566. Rather, the burden is on the objecting party to show facts that give rise to an inference that the challenge was based on race. Id. Wilson has failed to do so in this case.

(6) Kauffman gave the following reason for excusing Pulluaim:

"She did not appear to understand my questions, she knows of Toni Wilson, the next juror coming up is a wife of a physician-a lot of this case turns on medical information."

(R. 491). It is reasonable for a prospective juror who is acquainted with the litigant- to be dismissed. Splunge v. State (1988), Ind., 526 N.E.2d 977, cert. denied (1989), --U.S.--, 109 S.Ct. 3165, 104 L.Ed.2d 1028. Based on Pulluaim's response that she had heard of Wilson, the

judge could have found that Pulluaim was acquainted with Wilson. In addition, the trial court judge agreed that Pulluaim did not appear to understand Kauffman's questions. The trial court's decision as to Pulluaim's understanding of Kauffman's questions necessarily involved the evaluation of Pulluaims's demeanor and credibility. Because the trial court judge observed Pulluaim during voir dire, he is the best position to judge Pulluaim's credibility and this court will not interfere with the trial court's decision. Id. The final reason given by Kauffman was that the next juror was the wife of a physician. Because there was considerable medical testimony, it is reasonable that, given the choice between an individual who is not familiar with medical terminology and who, being the spouse of a physician, might be familiarly with medical terms,

Kauffman would choose the latter.[3]

Issue II

(7) Wilson next claims the trial court erred in refusing her request for a limiting instruction as to the admissibility of Defense Exhibit "B", a medial report prepared by Dr. Gupta. Dr. Papadopoulos, a physician who examined Wilson shortly after the accident, referred Wilson to Dr. Gupta, a neurologist. Dr. Gupta was not called as a witness. However, the video taped deposition of Dr. Papadopoulos was shown to the jury. During his deposition, Dr. Papadopoulos sta-

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[3] We note that Kauffman could have stuck any of the jurors on the panel in order to assure that the physician's wife was on the panel. Thus, we believe this factor alone would not have been sufficient to show that his reason for striking juror Pulluaim was not racially motivated. However, this factor, taken with the other two factors-that Pulluaim did not seem to understand Kauffman's question and that she was familiar Wilson-demonstrate that Kauffman's reason for striking Pulluaim was not racially motivated.

ted that he took Dr. Gupta's report into consideration in attempting to diagnose Wilson's injuries. After Dr. Papadopoulos' deposition was shown to the jury, Kauffman sought to introduce Dr. Gupta's report, to which Wilson objected as heresay. When her objection was overruled, Wilson asked the court to instruct the jury that the report was not being placed in evidence to prove the truth of the matters contained in the report, but rather because Dr. Papadopoulos relied on the report in forming his opinion on Wilson's injuries. The court refused to give this instruction. Wilson now argues that, although the court did not err in permitting Dr. Papadopoulos to testify to the contents of the report, the court did err in permitting the report to be placed in evidence without an instruction limiting the purpose for which the report was being admitted. She argues that without such an

instruction, the jury would assume the report was admitted to prove the truth of the matters asserted in the report, thereby violating heresay rules. Kauffman, on the other hand, argues that the court did not err in refusing to give Wilson's instruction because the report was not inadmissible heresay. He cites Wilber v. State (1984), Ind., 460 N.E.2d 142, in support of his argument.

Traditionally, courts have excluded expert testimony which was based on information received from third parties prior to testifying. 13 Miller, Indiana Practice Sec. 703.104 (1984). Indiana, however, has abandoned that rule. For example, in Wilber, supra, Dr. Berg, a forensic pathologist testified as to his opinion of the cause of the victim's death. Dr. Berg's testimony referred directly to the content of medical reports prepared by the treating physician. The

court held that even though the treating physician's report may be admissible, the content of the report was admissible in conjunction with the coroner's findings. The court reasoned that:

"Such reports are routinely relied upon by forensic pathologist in arriving at their opinions as to cause of death, and when presented to the trier of fact by such persons at trial, in this form and manner, and for this purpose, testimony reflecting their content is not heresay." Id. at 143. See also Wickliffe v. State (1981), Ind., 424 N.E.2d 1007.

Here, however, the trial court permitted the report itself to be placed into evidence. The question of whether the reports on which experts rely are admissible was not answered in Wilber. The question was, however, addressed in Sills v. State (1984), Ind., 463 N.E.2d 228. A psychiatrist testified for the State as to

the defendant's sanity. The psychiatrist testified that he considered or relied on an electroencephalogram evaluation prepared by another doctor, a diagnostic evaluation of the defendant prepared for the Indiana Boys' School, and psychological and intelligence tests also prepared for the Boys' School. The State placed these reports into evidence over Sills' heresay objection. Our supreme court held that while it might have been better not to have admitted these documents directly into evidence, the judge did not exceed his discretion in doing so. The court stated:

"A review of the record in this case shows that the three exhibits were not being offered for the truth of the matters contained in them. Rather, they were being offered to establish the foundation of Dr. Duly's diagnosis. Before each exhibit was offered into evidence, Dr.

Duly was asked if it constituted material that he considered or relied upon in his evaluation of the defendant. No attempt was made to assert that the facts contained in the exhibits were true. While it might have been better not to have admitted these documents directly into evidence, see Smith v. State (1972) 259 Ind. 187, 285 N.E.2d 275, it was not necessarily an error to do so. In short, the trial judge has wide discretion in the admission of evidence. Under the circumstances of this case, we cannot say that the trial judge exceeded his discretion in allowing the state to admit these exhibits."

Id. at 234, 235.

Wilson does not dispute that Dr. Papadopoulos stated he relied on Dr. Gupta's report in forming his opinion. However, she points out that the following comment made by Kauffman during his clos-

ing argument demonstrates that the report was being offered to prove the truth of the matters contained therein:

"you will have Dr. Gupta's report back in the jury room and you can read it for yourself. He couldn't find anything" (R.340).

[8] This statement by Kauffman could be perceived as an attempt to assert the facts contained in Dr. Gupta's report as true. However, Wilson made no objection to this statement when it was made; therefore, she has waived any objection to it. Jester v. State (1990), Ind., 551 N.E. 2d 840. No other mention was made of Dr. Gupta's report by either party. Therefore, in line with Sills, we hold that, while it may have been better not to admit Dr. Gupta's report, it was not error for the court have done so.

Further, even if the trial court erred in admitting the report, it was not

reversible error. Reversible error cannot be predicated upon a trial court's admission or exclusion of evidence which is merely cumulative. Jordan v. Talaga (1989), Ind.App., 532 N.E.2d 1174. After reciting Wilson's symptoms, Dr. Gupta reached the following conclusion in his report.

" I am thus unable to demonstrate any evidence of radiculpathy [sic] [disease of the roots of spinal nerves. Gould Medical Dictionary 1148 (4th ed. 1979] in this patient. It is interesting to note that her auto accident was relatively minor with minimal whiplash injury. The neck and back pain are most likely musculoskeletal in origin. I was not able to convince myself regarding her complaint of shoulder drooping. I do not believe this is neurological in origin. Her treatment will remain symptomatic. I am giving able trial of Naprosyn along with small doses

of diazepam"

(R. 399). Wilson herself testified Dr. Gupta could find nothing wrong with her. (R. 281). In addition, Dr. papadopoulos testified that neither he nor Dr. Gupta could discover anything wrong with Wilson. Therefore, Dr. Gupta's report was merely cumulative and the trial court did not commit reversible error in refusing to give a limiting instruction.

Issue III

[9] Finally, Wilson argues the jury award of $10,000 was inadequate. At the very minimum, she claims she is entitled to $11,796.81 because the uncontroverted evidence shows she incurred medial expenses of $7,916.81 and lost income of $3,880.00. She requests a new trial on the issue of damages.

This court will reverse an award as inadequate only when the amount of damages assessed by the jury is so low that it

shows the jury was motivated by prejudice, passion, partiality or corruption, or considered some other improper element in reaching its decision. Barrow v. Talbott (1981), Ind. App., 417 N.E.2d 917. Where the evidence is conflicting as to the nature, extent, and source of the injury, the jury is in the best position to appraise damages. Id.

Here, the nature, extent and source of Wilson's injuries is conflicting. Wilson, Wilson's sister, and Wilson's boyfriend all testified that Wilson was in considerable pain. Wilson testified she could no longer participate in the activities she enjoyed before the accident.

Dr. Hal Miller, who did not treat Wilson until almost five years after the accident, testified that he found Wilson suffered from a chronic cervical/thoracic/lumbar sprain, which he attributed to the sudden acceleration of her car that

occurred when her car was hit. (R. 184-85). However, Dr. Papadopoulos, who saw Wilson shortly after the accident, testified he could find nothing wrong with her. Finally, Wilson herself admitted that she had seen several doctors, including doctors at the Mayo Clinic, who could find nothing wrong with her. She also admitted to having injured her back about a year before the accident.

It is obvious, therefore, that the evidence as to the nature, extent and source of Wilson's injury is conflicting. Given this conflict, in addition to the fact that the jury award was close to what Wilson claims is the minimum due to her, it cannot be said that the jury was motivated by passion, prejudice, or some other improper motive. The jury award of $10,000 is affirmed.

CONOVER and GARRARD,JJ., concur.

VOIR DIRE EXAMINATION OF

CHARLIE PULLUAIM BY JOHN ULMER

MR. ULMER: Ms. Pulluaim, you indicated you've been involved in some automobile accidents?

MS. PULLUAIM: Yes.

MR. ULMER: And in one you received some head injuries? And those were obvious? Did they incapacitate you for a period of time?

MS. PULLUAIM: No.

MR. ULMER: And you indicated that you were injured at work and received some serious injuries?

MS. PULLUAIM: Right.

MR. ULMER: What kind of injuries did you receive?

MS. PULLUAIM: I got my arm caught in a machine and it was broke and I had to have surgery twice.

MR. ULMER: And were you off for a

period of time?

MS. PULLUAIM: Yes. . .(indiscernible). . .

MR. ULMER: And are you now recovered?

MS. PULLUAIM: Yes.

MR. ULMER: Do you understand that by the mere filing of a lawsuit that does not establish the fact that plaintiff is entitled to recover?

MS. PULLUAIM: Yes.

MR. ULMER: And will you hold Ms. Wilson to the burden that if she's claiming injury she has to establish that they were caused by Mr. Kauffman's conduct?

MS. PULLUAIM: Yes.

MR. ULMER: And if she does not establish that, she can make no recovery? (No response.) Well, if the Court would so instruct you that before a plaintiff may recover, the plaintiff is responsible and has the burden of proving that the

injuries or damages she claims were caused by the defendant, would you follow that instruction. . .

MS. PULLUAIM: Yes.

MR. ULMER: . . .and if she has not established that burden, would you vote to not award her any money?

MS. PULLUAIM: I would have to hear all the facts before I could say.

MR. ULMER: That's fine. Now, you indicated that your prior occupation was a cashier at a Shell Station and at Burger King?

MS. PULLUAIM: Ah. . .about two years ago.

MR. ULMER: And what did you do at that. . .? It was a self-serve store?

MS. PULLUAIM: Uh huh.

MR. ULMER: Did you ever have any run-in with any customers?

MS. PULLUAIM: Yes.

MR. ULMER: Is there anything. . .as

you're sitting there today, do you have any questions of either Mr. Wicks or myself that we haven't answered?

MS. PULLUAIM: No.

MR. ULMER: Okay. Thank you very much.

STATE OF INDIANA)		ELKHART SUPERIOR
)	SS:	COURT NO. 3
ELKHART COUNTY)		
		CAUSE NO. 379
TONI WILSON,)		
Plaintiff)		
)		
v.)		CERTIFICATE OF
)		REPORTER
LEDGER D. KAUFFMAN,)		
Defendant)		

I, Cheryl Springer, Court Reporter for the Elkhart Superior Court No. 3, Goshen, Indiana, at the time of these proceedings, do hereby certify that I was the official reporter of said court, duly appointed and sworn to report the evidence in causes tried therein; that as such reporter, I took down in shorthand and also electronically recorded the entire proceedings in the cause set forth in the action hereof and that I did personally transcribe said transcript and certify that the foregoing is a true and correct transcript thereof.

Witness my hand and seal this 10th

day of August, 1989.

/S/Cheryl Springer
Cheryl Springer
Elkhart Superior Court 3
Elkhart County Courthouse
Goshen, IN 46526

IN THE SUPREME COURT OF INDIANA

NO. 20A04-8909-CV-398

TONI WILSON, Appellant, (Plaintiff Below),	) Appeal from the) Elkhart Superior) Court Div. II
v.	) Cause No. 379
LEDGER D. KAUFFMAN, Appellee, (Defendant Below).	) The Honorable) Worth N. Yoder,) Judge.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Toni Wilson, the Appellant above named, hereby appeals to the Supreme Court of the United States from the denial of Appellant's Petition for Transfer by the Indiana Supreme Court on June 27, 1991, which said Denial of Transfer affirms the decision by the Indiana Court of Appeals rendered on November 26, 1990.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(a).

The Court of Appeals of Indiana ruled that the burden was on Wilson to show

facts that give rise to an inference that the challenge was based on race after the trial court judge specified that defense counsel was required to state a racially neutral reason for peremptorily challenging the sole black juror on Wilson's panel of jurors. Appellant contends that the prima facie showing of purposeful racial discrimination is established where the sole juror of appellant's race is excluded by peremptory challenge and the trial court has placed on opposing counsel the burden to come forward with a neutral basis for the challenge. To place the burden of proof upon the minority litigant to prove the challenge was not racially motivated under such circumstances is a denial of the equal protection of the laws.

September 24, 1991.

BY: (s)Charles C. Wicks
Charles C. Wicks
Attorney for Appellant
514 South Main Street
P.O. Box 1884
Elkhart, Indiana 46515
Telephone: (219) 295-6924

Proof of Service

I, Charles C. Wicks, counsel for the Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of September, 1991, I served counsel for the Appellee, John D. Ulmer, counsel for the Appellee, at his address, 130 North Main Street, Post Office Box 575, Goshen Indiana 46526 Three (3) copies of Appellant's Petition for Writ of Certiorari.

VERIFIED PROOF OF SERVICE OF FILING A PETITION FOR WRIT OF CERTIORARI

I, Charles C. Wicks, being duly sworn upon my oath, allege and say:

1. That I am a member of the Bar of the United States Supreme Court.

2. That on the 24TH day of September, 1991, I deposited at the United States Post Office, Elkhart, Indiana, first class postage prepaid and properly addressed to the Clerk of this court forty (40) copies of Appellant's Petition for Writ of Certiorari within the time allowed for filing.

3. That, in addition, I deposited at the United States Post Office, Elkhart, Indiana, first class postage prepaid and properly addressed to John D. Ulmer, counsel for the Appellee, at his address, 130 North Main Street, Post Office Box 575,

Goshen, Indiana 46526 Three (3) copies of Appellant's Petition for Writ of Certiorari.

Charles C. Wicks
Attorney for Appellant
514 S. Main St.
P.O. Box 1884
Elkhart, Indiana 46515-1884
Telephone: (219) 295-6924

STATE OF INDIANA

COUNTY OF ELKHART

Before me, a Notary Public in and for said County and State, personally appeared Charles C. Wicks who acknowledged the execution of the foregoing pleading or paper and who, having been duly sworn, stated that any representations therein contained are true.

Witness my hand and Notarial Seal this 24th day of September, 1991.

Jan Clark, Notary Public
Residing in Elkhart County, In.
My Commission Expires: 11-2-92